FILED
JUL 23 1956
JOHN T. FEY, Cle

No. 271

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 15898

UNITED STATES OF AMERICA,

Appellant,

versus

RUTHERFORD T. CARLISLE, an individual trading as CARLISLE DRUGS,

Appellee,

Appeal from the United States District Court for the Southern District of Florida

(ORIGINAL RECORD RECEIVED DECEMBER 24, 1955)

U. S. COURT OF APPEALS
FILED
DECEMBER 24, 1955
John A. Feehan, Jr., Clerk

U. S. COURT OF APPEALS
FILED
FEB 6 1956
John A. Feehan, Jr.
CLERK

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F.D.C. No. 35147

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA

UNITED STATES OF AMERICA,

versus

RUTHERFORD T. CARLISLE, an individual
trading as CARLISLE DRUGS

No. 9176-Cr-J

(21 U.S.C. 331 and 333)

FILED
JACKSONVILLE, FLA., JANUARY 6, 1954
JULIAN A. BLAKE, Clerk

COUNT 1

The United States Attorney charges:

That prior to February 11, 1953, a number of dextroamphetamine sulfate tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B), as amended, were shipped in interstate commerce into the State of Florida, in a bottle labeled in part as follows:

> Caution — Federal law prohibits
> dispensing without prescription.

That thereafter, on or about February 11, 1953, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at Car-

lisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jacksonville, Florida, within the Southern District of Florida, cause a number of tablets of said drug to be dispensed to one Hosea R. Wallace, in a box labeled, "Dexedin sulf 5 mg" without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said box being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

COUNT II

The United States Attorney further charges:

That prior to February 15, 1953, a number of dextroamphetamine sulfate tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B), as amended, were shipped in interstate commerce into the State of Florida, in a bottle labeled in part as follows:

> Caution — Federal law prohibits dispensing without prescription.

That thereafter, on or about February 15, 1953, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at Carlisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jacksonville, Florida, within the Southern District of Florida, cause a number of

tablets of said drug to be dispensed to one Hosea R. Wallace, in a box labeled, "Dexedin sulf 5 mg" without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said box being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

COUNT III

The United States Attorney further charges:

That prior to February 13, 1953, a number of thyroid tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B) as amended, were shipped in interstate commerce into the State of Florida, in a bottle labeled in part as follows:

Caution – Federal law prohibits
dispensing without prescription.

That thereafter on or about February 13, 1953, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at Carlisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jacksonville, Florida, within the Southern District of Florida, cause said tablets of said drug in said bottle to be dispensed to one Leonard L. Blanton, without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drugs as aforesaid was an act caused to be done by said defendant,

contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said bottle being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

COUNT IV

The United States Attorney further charges:

That prior to February 16, 1953, a number of secobarbital sodium capsules, a drug within the meaning of 21 U.S.C. 353(b)(1)(A) as amended, were shipped in interstate commerce into the State of Florida, in a bottle labeled in part as follows:

Caution — Federal law prohibits
dispensing without prescription.

That thereafter, on or about February 16, 1953, and while a number of capsules of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at Carlisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jacksonville, Florida, within the Southern District of Florida, cause a number of capsules of said drug to be dispensed in a vial to one Hosea R. Wallace, upon his request for a refill of a written prescription identified as number 8683, issued on or about February 11, 1953, without obtaining authorization by the prescriber;

That displayed upon said vial was certain labeling which consisted among other things, of the following printed and graphic matter:

Carlisle Drugs
5012 W. Beaver St. Jacksonville, Florida
No. 8683 Dr. Grizzard
George R. Fowler
One only at bed time
2.13.53

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said vial being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

COUNT V

The United States Attorney further charges:

That prior to December 8, 1952, a number of sodium pentobarbital capsules, a drug within the meaning of 21 U.S.C. 353(b)(1)(A), as amended, were shipped in interstate commerce into the State of Florida in a bottle bearing a label which warned against dispensing said drug without a prescription;

That thereafter, on or about December 8, 1952, and while a number of capsules of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at Carlisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jackonville, Florida, within the Southern District of Florida, cause a number of capsules of said drug to be dispensed in a vial to one Leonard L. Blanton, upon his request for a refill of a written prescription identified as number 6798, issued on or about November

11, 1952, without obtaining authorization by the prescriber;

That displayed upon said vial was certain labeling which consisted among other things, of the following printed and graphic matter:

Carlisle Drugs
5012 W. Beaver St. Jacksonville, Florida
No. 6798 Dr. Gatling
Leonard Blanton
One at bed-time as needed for rest

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said vial being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

COUNT VI

The United States Attorney further charges:

That prior to December 31, 1952, a number of sodium pentobarbital capsules, a drug within the meaning of 21 U.S.C. 353(b)(1)(A), as amended, were shipped in interstate commerce into the State of Florida in a bottle labeled in part:

Caution: Federal law prohibits
dispensing without prescription.

That thereafter on or about December 31, 1952, and while a number of capsules of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at Carlisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jacksonville, Florida,

within the Southern District of Florida, cause a number of capsules of said drug to be dispensed in a vial to one Leonard L. Blanton, upon his request for a refill of a written prescription identified as number 6798, issued on or about November 11, 1952, without obtaining authorization by the prescribed;

That displayed upon said vial was the labeling displayed upon the vial described in the fifth Count of this Information, which said description in said fifth count is, by reference, hereby incorporated in this Count;

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant, contrary to the provision of 21 U.S.C. 353(b)(1), which resulted in said drug in said vial being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

EDITH HOUSE
Asst. United States Attorney for the
Southern District of Florida

MOTION TO DISMISS

FILED
JACKSONVILLE FLA., FEBRUARY 4, 1954
JULIAN A BLAKE, Clerk

Comes now the defendant, Rutherford T. Carlisle, an individual trading as Carlisle Drugs, by his undersigned attorneys, and moves the Court to dismiss the Information filed herein, and each and every count therein, for that:

1. The Information and each Count thereof fails to state an offense against the laws of the United States.

2. The Information fails to charge the defendant with any

knowledge of the acts contained therein.

3. The Information fails to charge the defendant has done an unlawful act.

4. It affirmatively appears in Counts IV, V and VI that the drug was dispensed upon a prescription and given by a licensed physician, and it is no violation of the law to dispense a drug in that manner.

5. Each count seeks to charge two offenses: To-wit, the issuance of a drug without a doctor's prescription, and (2) the failure to properly label the package containing the drug.

6. The Information fails to allege that the original package contained the language "Warning - may be habit forming"; and unless it did so, it is no offense for the drug to be dispensed without said warning thereon.

7. The Information seeks to show an offense by setting up technical and tenous definitions and circumstances of a complicated and intricate regulatory act without in any way alleging any knowledge or intent on the part of the defendant.

8. The law in question did not become effective until 1952, and the druggists of this country have never been informed of the true meaning of said law.

9. That a state of utter confusion exists in the drug industry because of this law and the dispensing of the drugs described therein.

10. The refilling of such prescriptions has been a practice of long standing with druggists, and for many years the Administrator of Food, Drugs and Cosmetics Act did not seek to restrict refills of prescriptions, and after it sought to do so Congress adopted a clarifying and definitive amendment, and the facts supporting the charges, viz, refilling prescrip-

tions does not constitute a criminal offense adequately and definitely spelled out in the Statute of Regulations as is required for criminal prosecution.

11. The druggists of America have not been properly educated and informed as to the law herein attempted to be invoked.

12. The sections of the Food and Drug Act upon which Information has been filed against this defendant are unconstitutional because the language of said statute is too vague and indefinite.

RUSH & PIERCE
By GEORGE A. PIERCE,
301 Florida Theatre Bldg.,
Jacksonville, Fla.
Attorneys for Defendant.

I hereby certify that I delivered a copy of the foregoing Motion to Dismiss to the United States District Attorney, at Jacksonville, Florida, by mail, at the Post Office Building, the 3 day of February, A. D. 1954.

GEORGE A. PIERCE
Attorney

AMENDED MOTION TO DISMISS

FILED
JACKSONVILLE, FLA., FEBRUARY 5, 1954
JULIAN A. BLAKE, Clerk

Comes now the defendant, Rutherford T. Carlisle, an individual trading as Carlisle Drugs, by his undersigned attorneys, and amends his original Motion to Dismiss by adding ground 13 thereto:

13. The sections of the Food and Drug Act upon which information has been filed against this defendant is unconstitutional, because the language of said statute is too vague and indefinite and deprives this defendant of his constitutional rights of the Fifth and Fourteenth Amendments of the Constitution of the United States.

RUSH & PIERCE,
By GEORGE A. PIERCE,
301 Florida Theatre Bldg.,
Jacksonville, Fla.
Attorneys for Defendant.

I hereby certify that I delivered a copy of the foregoing Amended Motion to Dismiss to the United States District Attorney, at Jacksonville, Florida, by mail, at the Post Office Building, Jacksonville, Florida, this 3 day of February, A. D. 1954.

GEORGE A. PIERCE

MOTION FOR BILL OF PARTICULARS

FILED
JACKSONVILLE FLA., FEBRUARY 4, 1954
JULIAN A. BLAKE, Clerk

The defendant, Rutherford T. Carlisle, pursuant to subparagraph (f) of Rule 7, of the Rules of Criminal Procedure, obtaining in the above styled court, moves the Court to direct the United States District Attorney or such other prosecuting attorney or officer as may be prosecuting this cause, to file a Bill of Particulars as to each count of the indictment filed herein, and set forth the following information:

AS TO COUNT I

1. Give exact number of dextro-amphetamine sulphate tablets alleged herein to have been shipped in interstate commerce.

2. Set forth the name of the consignor of said tablets.

3. Set forth the name of the consignee of said tablets.

4. Give the exact date this defendant is alleged to have purchased said tablets.

5. Give the quantity of said dextro-amphetamine sulphate tablets alleged to have been purchased by this defendant.

6. Give the name and address of the person, firm or corporation that is alleged to have sold said dextro-amphetamine sulphate tablets to this defendant.

7. State the exact number of tablets alleged to have been dispensed to Hosea R. Wallace.

8. Set forth the exact date of said alleged purchase of said tablets.

9. Set forth in detail the reasons given by said Hosea Wallace, if any, for the alleged purchase of said dextro-amphetamine sulphate tablets.

10. Set forth the exact time of day or night that said alleged purchase is alleged to have been made.

11. State whether anyone accompanied said Wallace at the time of said alleged purchase.

12. State the name and address of any person or persons accompanying said Wallace at the time of said alleged pur-

chase.

13. State whether said Hosea R. Wallace was, at the time of the alleged purchase, employed by the United States Government.

14. State whether any person or persons who might have accompanied Hosea R. Wallace was at the time of the alleged purchase employed by the United States Government.

15. If the answer to number 13 hereof is in the affirmative, set forth what branch of the United States Government said Hosea Wallace or person or persons accompanying him was employed by.

16. If the answer to number 13 hereof is in the affirmative, set forth the exact duties of Mr. Wallace, together with his title and the exact duties and title of any person or persons who might have accompanied Mr. Wallace at the time of the alleged purchase.

17. State whether this defendant filled said alleged prescription.

18. Set forth the name of the person who dispensed said alleged tablets to said Wallace.

19. Set forth in detail the conversation that the alleged Hosea R. Wallace had with the person alleged to have dispensed said drug at the time of the alleged purchase.

20. State whether any consideration was paid this defendant for the alleged purchase.

21. State the amount of consideration paid for the alleged purchase, if any.

AS TO COUNT II

1. Give exact number of dextro-amphetamine sulphate tablets alleged herein to have been shipped in interstate commerce.

2. Set forth the name of the consignor of said tablets.

3. Set forth the name of the consignee of said tablets.

4. Give the exact date this defendant is alleged to have purchased said tablets.

5. Give the quantity of said dextro-amphetamine sulphate tablets alleged to have been purchased by this defendant.

6. Give the name and address of the person, firm or corporation that is alleged to have sold said dextro-amphetamine sulphate tablets to this defendant.

7. State the exact number of tablets alleged to have been dispensed to Hosea R. Wallace.

8. Set forth the exact date of said alleged purchase of said tablets.

9. Set forth in detail the reasons given by said Hosea Wallace, if any, for the alleged purchase of said dextro-amphetamine sulphate tablets.

10. Set forth the exact time of day or night that said alleged purchase is alleged to have been made.

11. State whether anyone accompanied said Wallace at the time of said alleged purchase.

12. State the name and address of any person or persons accompanying said Wallace at the time of said alleged pur-

chase.

13. State whether said Hosea R. Wallace was, at the time of the alleged purchase, employed by the United States Government.

14. State whether any person or persons who might have accompanied Hosea R. Wallace was at the time of the alleged purchase employed by the United States Government.

15. If the answer to number 13 hereof is in the affirmative, set forth what branch of the United States Government said Hosea Wallace or person or persons accompanying him was employed by.

16. If the answer to number 13 hereof is in the affirmative, set forth the exact duties of Mr. Wallace, together with his title and the exact duties and title of any person or persons who might have accompanied Mr. Wallace at the time of the alleged purchase.

17. State whether this defendant filled said alleged perscription.

18. Set forth the name of the person who dispensed said alleged tablets to said Wallace.

19. Set forth in detail the conversation that the alleged Hosea R. Wallace had with the person alleged to have dispensed said drug at the time of the alleged purchase.

20. State whether any consideration was paid this defendant for the alleged purchase.

21. State the amount of consideration paid for the alleged purchase, if any.

AS TO COUNT III.

1. Give the exact number of thyroid tablets alleged herein to have been shipped in interstate commerce.

2. Set forth the name of the consignor of said tablets.

3. Set forth the name of the consignee of said tablets.

4. Give the exact date this defendant is alleged to have purchased said tablets.

5. Give the quantity of said thyroid tablets alleged to have been purchased by this defendant.

6. Give the name and address of the person, firm or corporation that is alleged to have sold said thyroid tablets to this defendant.

7. State the exact number of tablets alleged to have been dispensed to Leonard L. Blanton.

8. Set forth the exact date of said alleged purchase of said tablets.

9. Set forth in detail the reasons given by said Leonard L. Blanton, if any, for the alleged purchase of said thyroid tablets.

10. Set forth the exact time of day or night that said alleged purchase is alleged to have been made.

11. State whether anyone accompanied said Blanton at the time of said alleged purchase.

12. State the name and address of any person or persons accompanying said Blanton at the time of said alleged purchase.

13. State whether said Blanton was, at the time of the alleged purchase, employed by the United States Government.

14. State whether any person or persons who might have accompanied Leonard L. Blanton was at the time of the alleged purchase employed by the United States Government.

15. If the answer to number 13 hereof is in the affirmative, set forth what brance of the United States Government said Leonard L. Blanton or person or persons accompanying him was employed by.

16. If the answer to number 13 hereof is in the affirmative, set forth the exact duties of Mr. Blanton, together with his title and the exact duties and title of any person or persons who might have accompanied Mr. Blanton at the time of the alleged purchase.

17. State whether this defendant filled said alleged prescription.

18. Set forth the name of the person who dispensed said alleged tablets to said Blanton.

19. Set forth in detail the conversation that the alleged Leonard L. Blanton had with the person alleged to have dispensed said drug at the time of the alleged purchase.

20. State whether any consideration was paid this defendant for the alleged purchase.

21. State the amount of consideration paid for the alleged purchase, if any.

AS TO COUNT IV.

1. Give exact number of secobarbital sodium capsules al-

leged herein to have been shipped in interstate commerce.

2. Set forth the name of the consignor of said capsules.

3. Set forth the name of the consignee of said capsules.

4. Give the exact date this defendant is alleged to have purchased said capsules.

5. Give the quantity of said secobarbital sodium capsules alleged to have been purchased by this defendant.

6. Give the name and address of the person, firm or corporation that is alleged to have sold said secobarbital sodium capsules to this defendant.

7. State the exact number of capsules alleged to have been dispensed to Hosea R. Wallace.

8. Set forth the exact date of said alleged purchase of said capsules.

9. Set forth in detail the reasons given by said Hosea Wallace, if any, for the alleged purchase of said secobarbital sodium capsules.

10. Set forth the exact time of day or night that said alleged purchase is alleged to have been made.

11. State whether anyone accompanied said Wallace at the time of said alleged purchase.

12. State the name and address of any person or persons accompanying said Wallace at the time of said alleged purchase.

13. State whether said Hosea R. Wallace was, at the time of the alleged purchase, employed by the United States Gov-

ernment.

14. State whether any person or persons who might have accompanied Hosea R. Wallace was at the time of the alleged purchase employed by the United States Government.

15. If the answer to number 13 hereof is in the affirmative, set forth what branch of the United States Government said Hosea R. Wallace or person or persons accompanying him was employed by.

16. If the answer to number 13 hereof is in the affirmative, set forth the exact duties of Mr. Wallace, together with his title and the exact duties and title of any person or persons who might have accompanied Mr. Wallace at the time of the alleged purchase.

17. State whether this defendant filled said alleged prescription.

18. Set forth the name of the person who dispensed said alleged capsules to said Wallace.

19. Set forth in detail the conversation that the alleged Hosea R. Wallace had with the person alleged to have dispensed said drug at the time of the alleged purchase.

20. State whether any consideration was paid this defendant for the alleged purchase.

21. State the amount of consideration paid for the alleged purchase, if any.

22. Set forth the exact date of the alleged prescription.

23. Explain how said Hosea R. Wallace gained possession of the alleged prescription.

24. Set forth when said Hosea R. Wallace was given possession of said alleged prescription.

25. Set forth how said prescription was obtained from Dr. Grizzard.

26. Set forth if said prescription was obtained after first making a diagnosis of the person requesting said prescription.

27. Set forth Dr. Grizzard's diagnosis giving rise to the need of the administration of said drug.

28. State whether more than one prescription was obtained from Dr. Grizzard when this prescription was delivered.

29. If the answer to number 28 is in the affirmative, state the reasons given Dr. Grizzard for obtaining more than one prescription.

30. If more than one prescription was given, please state as to each prescription whether a diagnosis of the person requesting said prescription was made.

31. Set forth the diagnosis made by Dr. Grizzard for the issuance of other prescriptions.

32. Give the address of one George R. Fowler.

33. State whether there is any such person as George R. Fowler.

34. State how the Government came to the conclusion that said prescription was obtained without obtaining authorization of the prescriber, Dr. Grizzard.

AS TO COUNT V.

1. Give exact number of sodium pentobarbital capsules alleged herein to have been shipped in interstate commerce.

2. Set forth the name of the consignor of said capsules.

3. Set forth the name of the consignee of said capsules.

4. Give the exact date this defendant is alleged to have purchased said capsules.

5. Give the quantity of said sodium pentobarbital capsules alleges to have been purchased by this defendant.

6. Give the name and address of the person, firm or corporation that is alleged to have sold said sodium pentobarbital capsules to this defendant.

7. State the exact number of tablets alleged to have been dispensed to Leonard L. Blanton.

8. Set forth the exact date of said alleged purchase of said capsules.

9. Set forth in detail the reasons given by said Leonard L. Blanton, if any, for the alleged purchase of said sodium pentobarbital tablets.

10. Set forth the exact time of day or night that said alleged purchase is alleged to have been made.

11. State whether anyone accompanied said Blanton at the time of said alleged purchase.

12. State the name and address of any person or persons accompanying said Blanton at the time of said alleged purchase.

13. State whether said Leonard L. Blanton was, at the time of the alleged purchase, employed by the United States Government.

14. State whether any person or persons who might have accompanied Leonard L. Blanton was at the time of the alleged purchase employed by the United States Government.

15. If the answer to number 13 hereof is in the affirmative, set forth what branch of the United States Government said Leonard L. Blanton or person or persons accompanying him was employed by.

16. If the answer to number 13 hereof is in the affirmative, set forth the exact duties of Mr. Blanton, together with his title and the exact duties and title of any person or persons who might have accompanied Mr. Blanton at the time of the alleged purchase.

17. State whether this defendant filled said alleged prescription.

18. Set forth the name of the person who dispensed said alleged capsules to said Blanton.

19. Set forth in detail the conversation that the alleged Leonard L. Blanton had with the person alleged to have dispensed said drug at the time of the alleged purchase.

20. State whether any consideration was paid this defendant for the alleged purchase.

21. State the amount of consideration paid for the alleged purchase, if any.

22. Give the exact date of the alleged prescription.

23. Explain how said Leonard L. Blanton gained possession of the alleged prescription.

24. Set forth when said Leonard L. Blanton was given possession of said alleged prescription.

25. Set forth how said prescription was obtained from Dr. Gatlin.

26. Set forth what representations were made to Dr. Gatlin in order to induce him to issue said prescription No. 6798.

27. Set forth if said prescription was given after first making a diagnosis of the said Leonard Blanton, who requested said prescription.

28. State whether or not Leonard L. Blanton, named herein, and Leonard Blanton, named in the alleged prescription, are one and the same person.

29. Set forth Dr. Gatlin's diagnosis giving rise to the administration of said drug to Leonard Blanton.

30. State whether more than one prescription was obtained from Dr. Gatlin when the prescription involved herein was delivered.

31. If the answer to number 30 is in the affirmative, state the reasons given Dr. Gatlin for issuing more than one prescription.

32. If the answer to number 30 is in the affirmative, state whether an individual diagnosis was made for each of the other prescriptions given by Dr. Gatlin.

33. Set forth the diagnoses made by Dr. Gatlin for the issuance of the other prescriptions referred to, if any.

34. Give the correct address of Leonard Blanton.

35. State whether there is any such person as Leonard Blanton.

36. State how the government came to the conclusion that said prescription was obtained without obtaining authorization of the prescriber, Dr. Gatlin.

37. Was the prscription described herein delivered personally to Leonard Blanton?

38. If the prescription was not delivered personally to Leonard Blanton by Dr. Gatlin, how did Leonard Blanton get possession of same.

AS TO COUNT VI

1. Give exact number of sodium pentobarbital capsules alleged herein to have been shipped in interstate commerce.

2. Set forth the name of the consignor of said capsules.

3. Set forth the name of the consignee of said capsules.

4. Give the exact date this defendant is alleged to have purchased said capsules.

5. Give the quantity of said sodium pentobarbital capsules alleged to have been purchased by this defendant.

6. Give the name and address of the person, firm or corporation that is alleged to have sold said sodium pentobarbital capsules to this defendant.

7. State the exact number of capsules alleged to have been dispensed to Leonard L. Blanton.

8. Set forth the exact date of said alleged purchase of

said capsules.

9. Set forth in detail the reasons given by said Leonard L. Blanton, if any, for the alleged purchase of said sodium pentobarbital tablets.

10. Set forth the exact time of day or night that said alleged purchase is alleged to have been made.

11. State whether anyone accompanied said Blanton at the time of said alleged purchase.

12. State the name and address of any person or persons accompanying said Blanton at the time of said alleged purchase.

13. State whether said Leonard L. Blanton was, at the time of the alleged purchase, employed by the United States Government.

14. State whether any person or persons who might have accompanied Leonard L. Blanton was at the time of the alleged purchase employed by the United States Government.

15. If the answer to number 13 hereof is in the affirmative, set forth what branch of the United States Government said Leonard L. Blanton or person or persons accompanying him was employed by.

16. If the answer to number 13 hereof is in the affirmative, set forth the exact duties of Mr. Blanton, together with his title and the exact duties and title of any person or persons who might have accompanied Mr. Blanton at the time of the alleged purchase.

17. State whether this defendant filled said alleged prescription.

18. Set forth the name of the person who dispensed said alleged capsules to said Blanton.

19. Set forth in detail the conversation that the alleged Leonard L. Blanton had with the person alleged to have dispensed said drug at the time of the alleged purchase.

20. State whether any consideration was paid this defendant for the alleged purchase.

21. State the amount of consideration paid for the alleged purchase, if any.

22. Give the exact date of the alleged prescription.

23. Explain how said Leonard L. Blanton gained posession of the alleged prescription.

24. Set forth when said Leonard L. Blanton was given possession of said alleged prescription.

25. Set forth how said prescription was obtained from Dr. Gatlin.

26. Set forth what representations were made to Dr. Gatlin in order to induce him to issue said prescription No. 6798.

27. Set forth if said prescription was given after first making a diagnosis of the said Leonard Blanton, who requested said prescription.

28. State whether or not Leonard L. Blanton, named herein, and Leonard Blanton, named in the alleged prescription, are one and the same person.

29. Set forth Dr. Gatlin's diagnosis giving rise to the administration of said drug to Leonard Blanton.

30. State whether more than one prescription was obtained from Dr. Gatlin when the prescription involved herein was delivered.

31. If the answer to number 30 is in the affirmative, state the reasons given Dr. Gatlin for issuing more than one prescription.

32. If the answer to number 30 is in the affirmative, state whether an individual diagnosis was made for each of the other prescriptions given by Dr. Gatlin.

33. Set forth the diagnoses made by Dr. Gatlin for the issuance of the other prescriptions referred to, if any.

34. Give the correct address of Leonard Blanton.

35. State whether there is any such person as Leonard Blanton.

36. State how the Government came to the conclusion that said prescription was obtained without obtaining authorization of the prescriber, Dr. Gatlin.

37. Was the prescription herein delivered personally to Leonard Blanton?

38. If the prescription was not delivered personally to Leonard Blanton by Dr. Gatlin, how did Leonard Blanton get possession of same?

AS TO ALL COUNTS OF THE INFORMATION

1. Set forth the exact day or days that the Government made an inspection of this defendant's place of business.

2. Set forth item by item the documents, or bottles, or cartons, and facts obtained by the said search of this defend-

ant's place of business alleged in number 1.

3. State whether or not a search warrant was obtained prior to making an inspection of this defendant's place of business referred to herein.

4. State whether or not any documents, and papers, were removed from this defendant's place of business after and during said inspection referred to herein.

5. Enumerate in detail a full description of the documents and evidence, if any, removed from this defendant's place of business during said inspection.

6. State by what authority said inspection of this defendant's premises referred to herein was made.

7. Give the name and address of each witness to be used by the Government in presentation of its cause.

This Motion for Bill of Particulars is made upon the ground that the charges of this Information are so general in their nature that they do not fully advise this defendant of the specific acts, the time of commission, the method of commission with which he is charged, so that he may properly prepare his defense and avoid surprise at the trial, and this motion is requested so that this defendant may better acquaint himself with the crime charged so that he can and may properly prepare his defense.

RUSH & PIERCE
By GEORGE A PIERCE
Attorney for Defendant.
301 Florida Theatre Bldg.
Jacksonville, Duval County, Florida.

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

Before me the undersigned notary public appeared RUTHERFORD T. CARLISLE, the defendant in the above-styled cause, who states upon his oath that the foregoing motion is filed by him in good faith and for the purposes therein expressed.

RUTHERFORD T. CARLISLE

Sworn to and subscribed before me
this 2nd day of February, A.D. 1954.
ANNA S. REED
Notary Public, State of Florida at large
My commission expires Dec. 15, 1954.
Bonded by American Surey Co. of N.Y.

I hereby certify that I delivered a copy of the foregoing Motion for Bill of Particulars to the United States Attorney by mail, at the Post Office Building, Jacksonville, Duval County, Florida, this 2 day of February, A. D. 1954.

GEORGE A. PIERCE
Attorney.

MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPIRESSION OF EVIDENCE

FILED
JACKSONVILLE FLA., FEBRUARY 4, 1954
JULIAN A. BLAKE, Clerk

Comes now the defendant, Rutherford T. Carlisle, an individual trading as Carisle Drugs, by his undersigned at-

torneys, and moves this Court to direct that certain property of which he is the owner, a schedule of which is annexed hereto marked Exhibit "A", and incorporated herein by reference, and which on the afternoons and night of February 17th and 18th, 1953, at the premises known as Carlisle Drugs, at 5012 West Beaver Street, Jacksonville, Duval County, Florida, was unlawfully seized and taken from him by two agents of the Food and Drug Administration of the United States Government, whose names are Leonard L. Blanton and Hosea Wallace, be returned to him and that it and all information obtained in connection therewith be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property described in Schedule marked Exhibit "A", attached hereto, was seized against his will and without a search warrant; that the evidence so obtained cannot be used against this defendant because of Section 373 of the United States Code Title 21, and that there was no request accompanied by a statement in writing made to this defendant prior to said search and seizure, and further because of that portion of the Federal Constitution providing against unreasonable seizure.

RUSH & PIERCE
By GEORGE A PIERCE
Attorney for Defendant.
301 Florida Theatre Bldg.,
Jacksonville, Fla.

I hereby certify that I delivered a copy of the foregoing Motion for the Return of Seized Property and the Suppression of Evidence to the United States District Attorney, at Jacksonville, Florida, by mail, at the Post Office Building, the 2 day of February, A. D. 1954.

GEORGE A. PIERCE
Attorney

EXHIBIT "A".

1. Samples of drugs seized by agents.

2. Any information obtained by Government based on said illegal search and seizure.

3. Any memorandum prepared by agents of plaintiff after checking this defendant's drug department.

4. Any statement or statements signed by this defendant after said illegal search and seizure.

5. Any admission or statements made verbally by this defendant at the time of, during, or after said illegal search and seizure.

6. Any original prescriptions.

7. Any invoices.

8. Any copies of invoices or information obtained therefrom.

9. Any bottle, bottles, box, boxes, carton or cartons illegally seized.

MOTION FOR DISCOVERY AND INSPECTION

FILED
JACKSONVILLE, FLA., FEBRUARY 4, 1954
JULIAN A. BLAKE, Clerk

Comes now the defendant, by his undersigned attorneys, and moves the Court to order the attorney for the United States Government to permit the defendant or his attorneys to inspect, photograph and/or copy the following:

1. Any statement or statements made to Government Agents by the defendant concerning any facts in this case.

2. Any reports made by Government Agents concerning defendant's alleged commission of the alleged crime.

3. All books, papers, documents or tangible objects obtained from or belonging to the defendant which were seized by the Agent or Agents of the Government.

4. All books, papers, documents or tangible objects obtained from others concerning this defendant and seized by the Government.

5. All records, prescriptions, copies of prescriptions, cartons, bottles and any other tangible objects seized by the United States Government at the time of the inspection of this defendant's drug store.

6. Any statement or statements now in the possession of the United States Government made by persons other than this defendant concerning this case.

7. The alleged drugs seized by the United States Government, together with the box or container in which said drugs were delivered.

8. The bottle referred to in Counts I, II, III, IV, V, & VI, bearing the inscription - "Federal law prohibits dispensing without prescription".

9. Any bills of lading, invoices or sales slips showing shipment of any of the drugs in interstate commerce described in each of the counts of said Information.

10. Any sales slips, invoices, showing sale of any of the drugs alleged in each of the individual counts of this Information to this defendant.

11. Written prescription number 8683 and 6798, described in Counts IV, V and VI of the Government's Information.

12. Any statement or statements, verbal or written, in the possession of the Government, which may have been made by any employee of this defendant.

13. Any statement made by any wholesale drug concern, or retail drug concern, showing sale of any of the drugs described in this Information, to this defendant.

14. Any regulations or rules that may have been promulgated and in force and effect at the time of the alleged crime published or perpared by the Food and Drug Administration of the United States Government.

The reason for request for discovery and inspection is that this defendant has been a druggist in the State of Florida since 1920 and is now operating a successful business in Jacksonville, and he is not aware of any evasion of the Food and Drug Laws of the United States Government, and is therefore totally unable at this time to prepare any defense other than the mere statement that he is not guilty. The above Information requested is vital to and material to this defendant's defense.

This motion is filed pursuant to the provisions of Rule 16 of the Federal Rules of Criminal Procedure obtaining before the above-styled Court.

RUSH & PIERCE
By GEORGE A. PIERCE,
301 Florida Theatre Bldg.
Jacksonville, Fla.
Attorneys for defendant.

I hereby certify that I delivered a copy of the foregoing Motion for Discovery and Inspection to the United States Dis-

trict Attorney at Jacksonville, Florida, by mail, at the Post Office Building, the 2 day of February, A.D. 1954.

GEORGE A. PIERCE
Attorney.

ORDER

FILED
JACKSONVILLE, FLA., AUGUST 4, 1955
JULIAN A. BLAKE, Clerk

All affected parties having been heard, after due notice, upon the matters herein disposed of, it is upon consideration

ORDERED and ADJUDGED:

1. The defendant's motion to dismiss (filed February 4, 1954, and amended February 5, 1954) is denied as to Counts I, II and III of the information, and is granted as to Counts IV, V and VI of the information, and said counts are dismissed. Counts IV, V and VI are dismissed on authority of Chief Judge Barker's dismissal of similar counts by orders entered August 1, 1952 in the following cases: U. S. v. Kilgore, 6016-T-Cr., U. S. v. Pomeroy, 6017-T-Cr., and U. S. v. Webb's City Incorporated, 6018-T-Cr.

2. The defendant's motion for the return of seized property and the suppression of evidence (filed February 4, 1954) is denied.

3. The defendant's motion for discovery and inspection under Rule 16, Federal Rules of Criminal Procedure (filed February 4, 1954) is granted as to Items 3, 4, 5, 7, 8, 9, 10, 11 and 14, and otherwise denied. The items indicated are required to be produced for the defendant or his attorney to inspect, photograph and/or copy, in the office of the U. S.

Attorney, 4th Floor, Federal Building, Jacksonville, Florida, for a period of 10 days at such time prior to September 15, 1955 as may be mutually agreed upon by counsel for the respective parties.

4. The defendant's motion for bill of particulars (filed February 4, 1954) is granted as to each of Items 11, 12, 13, 14, 15, 16, and 18 as to each of Counts I, II, and III, and otherwise denied. The United States shall file and serve said bill of particulars on or before September 15, 1955.

DONE AND ORDERED at Jacksonville, Florida, August 4, 1955.

BRYAN SIMPSON
United States District Judge

U. S. Attorney
George A. Pierce, Esq.

MOTION FOR AN ORDER CLARIFYING THE BASIS FOR DISMISSAL OF COUNTS IV, V, AND VI OF THE INFORMATION

FILED
JACKSONVILLE, FLA., AUGUST 16, 1955
JULIAN A. BLAKE, Clerk

Now comes the United States of America by James L. Guilmartin, United States Attorney for the Southern District of Florida, and respectfully moves this Honorable Court to Vacate or Amend its Order of August 4, 1955, dismissing Counts IV, V and VI of the information, and to Enter an Order clarifying its basis for dismissal for the reason that the United States plans to appeal this court's decision, and under 18 U.S.C. 3731, the specific grounds for decision in dismissing Counts IV, V and VI determines the court to which the Gov-

ernment may appeal. It is not clear whether or not the court's decision is based upon the validity or construction of the statute upon which Counts IV, V and VI are founded. Should the Government misinterpret the basis of this court's decision, an appeal to the wrong appellate court, an unnecessary expenditure of time and effort will result since that court will be required to transfer the case to the appropriate appellate court.

For the reasons stated above, the Government requests that an Order be entered vacating or amending its Judgment clarifying its basis for dismissal of Counts IV, V and VI of the information.

Dated August . 1955.

E. COLEMAN MADSEN
Ass't. United States Attorney

I certify that a copy of the foregoing Motion For An Order has been furnished by mail to George A. Pierce, Attorney, 1422 Barnett National Bank Building, Jacksonville, Florida.
Dated at Jacksonville, Florida, August 16, A. D. 1955.

E. COLEMAN MADSEN

MOTION FOR REHEARING FOR AN ORDER REINSTATING COUNTS IV, V AND VI OF THE INFORMATION

FILED
JACKSONVILLE, FLA., AUGUST 16, 1955
JULIAN A. BLAKE, Clerk

Now comes the United States of America by James L. Guilmartin, United States Attorney for the Southern District of Florida, and respectfully moves this Honorable Court

for a rehearing on Defendant's Motion to Dismiss Counts IV, V and VI of the information, and for an Order reinstating Counts IV, V and VI of the information for the reason that the Order of Court dated August 4, 1955, dismissing Counts IV, V AND VI is based on a 1952 decision of Chief Judge Barker's dismissing counts in *United States* v. *Kilgore, etc.*, but the said three cases decided by Judge Barker were decided on entirely different provisions of law which were amended after the offenses there involved and before the offenses here occurred. The provision of the now existing law prohibiting the unauthorized refilling of prescriptions were not in effect when the offenses in Kilgore, Webb and Pomeroy were committed. Judge Barker, himself, at the time of his decision specifically made reference to the new "clarifying and definitive amendment" restricting refills of prescriptions, and he did not rule on the meaning of the new amendment. The instant case charges violations of this amendment, referred to by Judge Barker [21 U.S.C. 353(b)], it having been enacted on October 26, 1951, to become effective six months after that date.

For the reasons stated above, the Government requests that a rehearing be granted and that on such rehearing the Court enter an Order vacating its judgment dismissing Counts IV, V and VI and reinstating said counts in the information.

Dated August 16, 1955.

Respectfully Submitted,
E. COLEMAN MADSEN
Ass't. United States Attorney

I certify that a copy of the foregoing Motion has been furnished by mail to George A. Pierce, Attorney, 1422 Barnett National Bank Building, Jacksonville, Florida.

Dated at Jacksonville, Florida, August 16, A.D. 1955.

E. COLEMAN MADSEN

ORDER

FILED
JACKSONVILLE, FLA., SEPTEMBER 2, 1955
JULIAN A. BLAKE, Clerk

The Court being advised of its judgment in the premises, it is upon consideration

ORDERED and ADJUDGED:

1. The defendant's motion for rehearing (filed August 16, 1955) is denied. Defendant, at the time of trial may renew said motion as to any questions of fact raised therein.

2. The motion of the United States (filed August 16, 1955) for rehearing, is denied.

3. The motion of the United States (filed August 16, 1955) for an order clarifying the basis for the dismissal of Counts IV, V and VI of the information is denied.

DONE AND ORDERED at Jacksonville, Florida, September 2, 1955.

BRYAN SIMPSON
United States District Judge

U. S. Attorney
George A. Pierce, Esq.

NOTICE OF APPEAL

FILED
JACKSONVILLE, FLA., SEPTEMBER 30 1955
JULIAN A. BLAKE, Clerk

NOTICE IS HEREBY GIVEN that the United States of America hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order of this Court dismissing Counts IV, V and VI of the information herein, which order was entered in this case on August 4, 1955. The motion of the United States for rehearing on defendant's motion to dismiss said counts was denied by order of this Court entered September 2, 1955.

Each of the said three counts of the information, dismissed as aforesaid, charged the defendant with dispensing drugs (defined by 21 USC 353 (b)(1)(A)) that had been shipped in interstate commerce, on request for refill of a written prescription without the authorization by the prescriber.

The order entered by this Court dismissing the aforesaid three counts of the information herein, and from which this appeal is taken, granted, as to the aforesaid three counts, a motion to dismiss, filed by the defendant, on the ground that the statute and regulations under which said counts were laid did not adequately and definitely spell out the offense sought to be charged in each of the three counts.

JAMES L. GUILMARTIN
United States Attorney

By EDITH HOUSE
Assistant United States Attorney
407 Post Office Building
(P.O. Box 59)
Jacksonville, Florida

FILED
JACKSONVILLE, FLA., OCTOBER 26, 1955
JULIAN A. BLAKE, Clerk

Pursuant to the Federal Rules of Criminal Procedure Appelee hereby desigrates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, the following portions of records, proceedings and evidence in this action:

1. Motion for Discovery and Inspection.

2. Amended Motion to dismiss.

3. Motion for Bill of Particulars.

4. Motion for the return of seized property and the suppression of evidenee.

5. The order dated August 4th. 1955 ruling on the above motions.

6. A copy of these directions to the Clerk.

Rutherford T. Carlisle,
By GEORGE A. PIERCE, his attorney.

Certificate of mailing

I herebt certify that a true copy of the above cross-directions of the Appellee was served on James L. Guilmartin United States Attorney, Post Office Building, Jacksonville, Florida, by mail this 25 th. day of October A. D. 1955.

GEORGE A. PIERCE
Attorney

AMENDED DESIGNATION

FILED
JACKSONVILLE, FLA., DECEMBER 20, 1955
JULIAN A. BLAKE, Clerk

Pursuant to the Federal Rules of Criminal Procedure the appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, the following portions of records, proceedings and evidence in this action:

1. The information.

2. Motion to dismiss.

3. Order of dismissal.

4. The government's motion for clarification and rehearing.

5. The order denying the government's motion for clarification for rehearing.

6. A copy of these directions to the Clerk.

JAMES L. GUILMARTIN
United States Attorney
By: E. COLEMAN MADSEN
Assistant United States Attorney

A copy of the above received this 20th day of December, 1955

GEORGE A. PIERCE

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL

FILED
JACKSONVILLE, FLA., NOVEMBER 8, 1955
JULIAN A. BLAKE, Clerk

It appearing to the Court that appellee herein has filed objection to a portion of appellant's designation of contents of record on appeal, which objection has not been ruled on, it is, on motion of appellant,

ORDERED that appellant shall have an extension of fifty (50) days from November 9, 1955, within which to file the transcript of record on appeal in this cause.

DONE AND ORDERED at Jacksonville, Florida, this 8th day of November, 1955.

BRYAN SIMPSON
UNITED STATES DISTRICT JUDGE
United States District Judge

Copy to
United States Attorney (Madsen)
George A. Pierce,

UNITED STATES OF AMERICA)
) ss:
SOUTHERN DISTRICT OF FLORIDA)

I, JULIAN A. BLAKE, CLERK of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered 1 to 41 inclusive, contain a true copy of all such papers and proceedings in the matter of United States of America -vs- Rutherford T. Carlisle, an individual, trading as Carlisle Drugs, Case No. 9176-Cr-J., as appear upon the records and files of my office which have been directed to be included in said transcript by the agreement of the parties.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Jacksonville, Florida on this the 22nd day of December, A. D. 1955.

JULIAN A. BLAKE, CLERK
United States District Court
Southern District of Florida

By: WESLEY R. THIES
Deputy Clerk

FILED
JUL 23 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 271

IN THE MATTER

OF

RUTHERFORD T. CARLISLE, an individual trading as CARLISLE DRUGS,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD S. HEMPHILL

Florida Title Building
Jacksonville, Florida

GEORGE A. PIERCE

504 Barnett Bank Building
Jacksonville, Florida

Attorneys for Petitioners.

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IN THE

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OCTOBER TERM, 1955

No.

IN THE MATTER

OF

RUTHERFORD T. CARLISLE, an individual trading as CARLISLE DRUGS,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW.

The order of the District Court (R. p. 37) has not been reported. Complete copy is contained in the Record (R. p. 37).

The opinion of the Court of Appeals (R. pp. 44-50) has not been reported. Complete copy is contained in the Record (R. pp. 44-50).

JURISDICTION.

The Judgment of the Court of Appeals was entered May 31st. (R. p. 51).

Order denying Petition for rehearing was entered June 30, 1956. (R. P. 55)

Jurisdiction to issue the writ rests on Rules 19 and 22 Revised Rules of the Supreme Court of the United States and 28 United States Code, Section 1254.

QUESTIONS PRESENTED.

1. The Fifth Circuit Court of Appeals had no jurisdiction to entertain said appeal.

2. Appeal in this case from the District Court should have been taken by the Respondent direct to this Honorable Court because the constitutionality of Section 353 (b) (1) of Title 21 of the United States Code, Sections 331 (k) of Title 21 of the United States Code and Section 352 (d) of Title 21 of the United States Code, was the question involved in said appeal.

3. To reverse the District Court in this case the Court of Appeals had to hold the sections quoted in Question 2 appealed from were constitutional, after said District Court had found said Sections to be unconstitutional because they were vague, indefinite and uncertain.

4. That portions of the Pure Food and Drug Act, Title 21, United States Code, Section 353 (b) (1), Title 21, United

States Code, Section 331 (k), and Title 21, United States Code, Section 352 (d) appealed from by Respondent from the District Court to the Fifth Circuit Court of Appeals are vague, indefinite and uncertain, and therefore are unconstitutional.

5. The Court of Appeals in rendering its opinion refused and failed to follow the cases decided by Honorable William Barker on August 1, 1952, to-wit:

U. S. vs. Kilgore = 6016-T-Criminal,

U. S. vs. Pomeroy = 6017-T-Criminal,

U. S. vs. Webb's City, Inc., = 6018-T-Criminal,

of the Southern District of Florida, Tampa Division.

Opinion in each of said cases are unreported, but are appended hereto as Appendix, Nos. I, II, and III.

6. The Court of Appeals erred in not following the reasoning of said Judge William Barker in the three unreported cited above in Ground Five (5) hereof.

7. The Court of Appeals erred in failing to take into consideration that the information (R. pp. 1-7) failed to allege that the original package contained the language "Warning - may be habit forming."

8. The Court of Appeals erred in not finding that the charges fail to state an offense against the Laws of the United States.

STATUTES INVOLVED

The statutes involved are portions of the Federal Pure Food Drug and Cosmetic Act, to-wit:-

21 United States Code, Section 353 (b) (1), which provides

A drug intended for use by man which

(a) is a habit forming drug to which Section 502 (d) applies, or * * *

shall be dispensed only (1) upon a written prescription of a practitioner licensed by law to administer such drug, or (2) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist or by refilling any such written oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

21 United States Code, Section 352 (d)

A drug or device shall be deemed to be misbranded -

(d) If it is used by man and contains any quantity of the narcotic or hypnotic substance alpha-eucaine, barbituric acid, beta-eucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulfonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name, and quantity or proportion of such substance or derivative and in juxaposition therewith with the statement "Warning - May be habit forming."

21 United States Code, Section 331 (k):

The following acts and the causing thereof are hereby prohibited:-

* * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

STATEMENT OF THE CASE.

On January 6, 1954, the Respondent filed in the United States Court for the Southern District of Florida at Jacksonville, Florida, an information against the Petitioner. This information contained six counts. (R. pp. 1-7).

The first three counts of said information charged the Petitioner with dispensing without a prescription dextroamphetamine and thyroid tablets. (R. pp. 1-4).

Counts IV, V, adn VI of said information charged that the Petitioner violated the Pure Food and Drug Act by dispensing secobarbital sodium and sodium pent-barbital capsules upon the request of a certain person for a refill of a written prescription without obtaining authorization by the prescriber. (R. pp. 4-7).

On February 4, 1954, the Petitioner filed a motion to dismiss the aforesaid information (R. pp. 7-10). Said motion consisted of thirteen Grounds (The thirteenth Ground appears

on page 10 of the Record.) The Grounds of said Motion to Dismiss are as follows:

1. The Information and each Count thereof fails to state an offense against the laws of the United States.

2. The Information fails to charge the defendant with any knowledge of the acts contained therein.

3. The Information fails to charge the defendant has done an unlawful act.

4. It affirmatively appears in Counts IV, V, and VI that the drug was dispensed upon a prescription and given by a licensed physician, and it is no violation of the law to dispense a drug in that manner.

5. Each count seeks to charge two offenses: To-wit: the issuance of a drug without a doctor's prescription, and (2) the failure to properly label the package containing the drug.

6. The Information fails to allege that the original package contained the language "Warning - may be habit forming;" and unless it did so, it is no offense for the drug to be dispensed without said warning thereon.

7. The Information seeks to show an offense by setting up technical and tenous definitions and circumstances of a complicated and intricate regulatory act without in any way alleging any knowledge or intent on the part of the defendant.

8. The law in question did not become effective until 1952, and the druggists of this country have never been informed of the true meaning of said law.

9. That a state of utter confusion exists in the drug

industry because of this law and the dispensing of the drugs described therein.

10. The refilling of such prescriptions has been a practice of long standing with druggists, and for many years the Administrator of Food, Drugs and Cosmetics Act did not seek to restrict refills of prescriptions, and after it sought to do so Congress adopted a clarifying and definite amendment, and the facts supporting the charges, viz, refilling prescriptions does not constitute a criminal offense adequately and definitely spelled out in the Statute of Regulations as is required for criminal prosecution.

11. The druggists of America have not been properly educated and informed as to the law herein attempted to be invoked.

12. The sections of the Food and Drug Act upon which Information has been filed against this defendant are unconstitutional because the language of said statute is too vague and indefinite.

13. The sections of the Food and Drug Act upon which Information has been filed against this defendant is unconstitutional because the language of said statute is too vague and indefinite and deprives this defendant of his constitutional rights of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Argument was had on said motion and briefs submitted. On August 4, 1954, the District Court entered its order (R. p. 33), denying the motion to dismiss as to Counts I, II and III, but granting said motion to dismiss Counts IV, V and VI, and in the order stated:-

> "The defendant's motion to dismiss * * * is granted as to Counts IV, V and VI of the Information, and

said Counts are dismissed. Counts IV, V and VI are dismissed on authority of Chief Judge Barker's dismissal of similar counts by orders entered August 1, 1952 in the following cases:

U. S. vs. Kilgore, # 6016-T-Criminal,
U. S. vs. Pomeroy, # 6017-T-Criminal,
U. S. vs. Webb's City, Inc., # 6018-T-Criminal."

It should be noted here that the District Judge granted the entire motion to dismiss, which included Grounds 3, 4, 10, 12 and 13. (R. pp. 8-9-10).

Respondent then filed a motion for an order clarifying the basis for dismissal of Counts IV, V and VI (R. pp. 34-35), and also a motion for rehearing (R. pp. 35-36). The Respondent's motion for clarifying the basis for dismissal, among other things, stated:

"Now comes The United States of America * * * and * * * moves this * * * Court * * * to enter an order clarifying its basis for dismissal for the reason that the United States plans to appeal this court's decision, and under 18 U.S.C. 3731, the specific grounds for decision in dismissing Counts IV, V and VI determines the court to which the Government may appeal. It is not clear whether or not the court's decision is based upon the validity or construction of the statute upon which Counts IV, V and VI are founded."

The District Judge, on September 2, 1955, entered an order denying the Respondent's motion for clarification of its previous order, without comment. (R. p. 37).

Notice of appeal to the Fifth Circuit Court of Appeals was filed September 30, 1955. (R. p. 38). This appeal was

perfected and oral argument was had before said Court on April 24, 1956, and on May 31, 1956, said Court of Appeals entered its order and opinion herein. (R. pp. 44-50).

The Petitioner filed herein his petition for rehearing, which petition was denied on June 30, 1956. (R. pp. 52-55).

It is from last Order that this appeal is taken.

BASIS OF FEDERAL JURISDICTION.

Federal jurisdiction in this court of first instance is based upon the fact that the constitutionality of the above quoted provisions of the Pure Food, Drug and Cometic Act of Congress is involved, to-wit: 21 United States Code, Sections 353 (b) (1), Section 331 (k) and Section 352 (d).

ARGUMENT.

COURT OF APPEALS HAD NO JURISDICTION TO ENTERTAIN SAID APPEAL

The rule seems to be that if the constitutionality of an Act of Congress is involved, then the appeal should be direct from the District Court to this Court.

28 U.S.C., Section 1291, provides that:-

> "The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * * except where a direct review may be had in the Supreme Court."

18 U.S.C., Section 3731, provides:

> "An appeal may be taken by and on behalf of the United States from the District Courts direct to the

> Supreme Court of the United States in all criminal cases in the following cases:
>
> From a decision or judgment setting aside, or dismissing, any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

The decision of the District Court Judge dismissing Counts IV, V and VI of the information was based solely on the invalidity or construction of the statute upon which the information was founded. In fact the District Judge held the statute void because it was vague, indefinite and uncertain.

The Respondent indicated its uncertainity in appealing in its motion for an order clarifying the basis of dismissal of Counts IV, V and VI of the information. (R. pp. 34-35) when it stated:-

> "It is not clear whether or not the Court's decision is based upon the validity or construction of the statute upon which Counts IV, V and VI are founded."

DUTY OF COURT.

It is the duty of the Supreme Court to ascertain from the record whether the Court below could properly take jurisdiction. *Great Southern Fire Proof Hotel* v. *Jones*, 177 U. S. 449, 44 L. Ed. 842.

Supreme Court on certiorari must determine whether Circuit Court of Appeals had jurisdiction though that question was not raised by counsel in either court. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, 79 L. Ed. 583.

We contend that it is perfectly apparent from the reading of the order of the District Court (R. pp. 33-34) that the District Court found said law to be unconstitutional.

This being the case, the appeal to the Court of Appeals was incorrect. The appeal should have been direct to this Court.

The Court of Appeals erred in not certifying the case directly to this Court.

The Court of Appeals admitted a constitutional question was to be decided when it stated in its opinion (R. p. 48):-

> "In addition, without clearly pointing out why that would make them so, appellee insists that Sections 353 (b) (1) and 331 (k) are unconstitutional in that they purport to affix a meaning and give a content to the word 'misbrand,' quite the contrary to the meaning given it in *Webster's Dictionary* and the Federal cases ° ° °."

> "Appellee urges upon us that the sales of the barbiturates did not and could not amount to 'alteration, mutilation, destruction or obliteration, or removal of the whole or any part of labeling' as defined in Section 331 (k); that the appellant must therefore contend that the offense is charged in that part of the section which provides 'or the doing of any other act with respect to drugs, ° ° ° which results in such article being adulterated or misbranded.' and that this produces a contradiction and vagueness which deprives the defendant of due process in failing to give notice of the offense with which he is charged."

Thus it clearly appears from reading the opinion of the lower court that the Court of Appeals did hold said Act

constitutional and that this was the only question to be decided in the case.

Under this specification of error the Respondent in the Court of Appeals discussed many principles relative to upholding the validity of a statute and the intention of Congress in passing the Durham-Humphrey Amendment, 21 U.S.C. 353 (b) (1).

The sole question involved in this case is, is 21 U.S.C. 353 (b) (1) and 331 (k) valid. The district court held it was invalid. With this principle petitioner agrees.

Counts IV, V and VI charge the petitioner with refilling a written prescription without obtaining authorization by the prescriber.

Each count in the declaration, IV, V and VI inclusive, charges that the barbiturate in question is a drug within the meaning of 21 U.S.C. 353 (b) (1).

Each count then goes on to allege that the act of dispensing the drug, as aforesaid, was an act done by the petitioner contrary to the provisions of 21 U.S.C. 353 (b) (1), and each count then goes on to say which resulted in said drug in said box being misbranded while held for sale in violation of Title 21 U.S.C. Section 331 (k).

Each of the counts seems to be duplicitous in that they charge two offenses; that is, dispensing a drug without a prescription and that the drug was misbranded in violation of another section.

Section 353 (b) (1), among other things, provides that none of the drugs described in the information can be dispensed upon a written prescription of a practioner licensed by law to administer such drug, or upon an oral prescription of such practioner when reduced promptly to writing and filed by the pharmacy * * *. And this section goes on to add - "The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in a drug being misbranded while held for sale."

Section 331 (k), 21 U.S.C., provides:

The following acts and causing thereof are hereby prohibited:

* * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling, of, *or the doing of any other act with respect to a food, drug, device or cosmetic*, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

It thus seems that the petitioner is being charged with dispensing a drug contrary to law, and is also being charged with a violation of misbranding statute.

This, therefore, makes each of the counts duplicitous and the district court was right in granting the motion to dismiss.

In reference to Grounds Twelve and Thirteen of Petitioner's motion to dismiss - constitutionality of Section 353 (b) (1) and Section 331 (k) 21 U.S.C. (R. pp. 7-10):

Webster's Dictionary gives a definite meaning to what the

word "misbranded" or "misbrand" means, and the Federal cases give a definite meaning to that.

See *Webster's New International Dictionary, Second Edition, Unabridged*, page 1658, which defines the word "misbrand" as follows:

> "Misbrand - To brand falsely; specify, to brand as containers of drugs or foofstuffs, in contravention of statutory requirements."

A point that the Petitioner desires to make is that the selling of said barbiturate does not amount to an alteration, a mutilation, destruction, obliteration or removal of the whole or any part of the labeling. The Respondent must contend that the offense is charged in that part of Section 331 (k) which provides "or the doing of any other act with respect to food, drug, device or cosmetic if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded." This language beginning with "the doing of any other act" of course must refer to alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling. Petitioner contends that the terms and provisions of these sections are too vague and indefinite and are therefore unconstitutional, and that said section is toovague for judicial enforcement.

As stated by Mr. Justice Douglas, in *United States of America* vs. *Cardiff*, 344 U. S. 174, 97 L. Ed. 200:

> "The vice of vagueness in criminal statutes is a treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (see United States vs. L. Cohen Grocery Company, 225 U. S. 81, 65 L. Ed.

> 516, 41 Sup. Ct. 298, 14 A.L.R. 1045) may be as much of a trap for the innocent as the ancient laws of Caligula."

This is what this Court said in declaring unconstitutional the inspection provision of the Food & Drug Act, to-wit, 21 U.S.C., Section 374, with regard to factory inspection. The offense as charged in this Information does not constitute misbranding as is clearly defined by the statute and by *Webster's Dictionary*, and the language of Section 331 (k), under which Petitioner attempted to be prosecuted, is so vague that it is unconstitutional, so we contend that the principle enunciated in *United States of America* vs. *Cardiff*, cited above, should likewise apply to the unconstitutionality of the portions of said Food & Drug Act that are now here under attack.

These grounds of the motion to dismiss attack the provisions of the Information on the ground that they are unconstitutional because they are too vague and indefinite.

In support of this ground see *United States of America* vs. *Cardiff*, 344 U. S. 174, 97 L. Ed. 200.

In this case the Supreme Court of the United States declared unconstitutional Section 301 (f) of the Food, Drug and Cosmetic Act and Section 704, which prohibited refusal by a factory operator to permit entry or inspection as authorized by said Section 704. Section 704 authorizes entry and inspection by federal officers or employees at reasonable times and after first making request and obtaining permission of the operator. In this case the Supreme Court held that the statute in making inspection dependent on consent and making refusal to give consent a crime, failed to give the factory owner fair warning of the criminal nature of his failure to give consent and was too vague for judicial enforcement.

See also the case of *Connally* vs. *General Construction*, 269 U. S. 385, 70 L. Ed. 322, where the Supreme Court of the United States held that the terms of penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

In the second headnote it is held that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

See note 70 L. Ed. 323, which provides:

> "While it is very generally recognized that the court may in a proper case declare a statute void and inoperative because of vagueness and indefiniteness the principle is not always formally at least referred to any specific constitutional provision."

Section 353 of the Code (b) (1), under which Dr. Carlisle has been indicted, provides:

> "The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in a drug being misbranded while held for sale."

See also Section 352 of Title 21, entitled "Misbranded Drugs and Devices, sub-paragraph (d), entitled

"Habit-forming substances" :

> "If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaine, barbituric acid, beta-eucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihauna,

> morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name, and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning - May be habit forming."

Section 331 (k), Title 21, United States Code, under which Dr. Carlisle is indicted, provides:

> "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, food, drug, device or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

The usual definition of misbranding appears in *United States* vs. *William H. Rorer*, D.C.P.A. 27 Sup. 671, 672, where it is held that the sale of bottle which contained thyroid tablets with average of not less than 2.41 grains of essential thyroid element but which bore label representing that they contained an average of 2 grains of thyroid, constituted illegal sale of misbranded drugs.

See *United States* vs. *Sullivan*, 332 U. S. 689, 92 L. Ed. 297, where it was held that the transfer of sulfathiazole tablets from properly labeled bottles to pill boxes labeled only sulfathiazole, constituted misbranding within the Food, Drug and Cosmetic Act providing that a drug is misbranded unless label contains adequate directions and adequate warning.

Counts IV, V and VI say that the barbiturate is a drug

within the meaning of 21 U.S.C. 353 (b) (1) (A). 21 U.S.C. 353 (b) (1) (A) defines a drug:

> "intended for use by man which - (A) is a habit-forming drug to which Sections 352 (d) of this title applies, or * * *."

PRESUMPTION THAT JUDGMENT BASED ON CONSTRUCTION OF STATUTE.

We contend that Petitioner is entitled to the presumption that the district court based its decision upon the construction and/or constitutionality of Section 353 (b) (1) and Section 331 (k) of the Pure Food, Drug and Cosmetic Act.

In this Connection see *Taylor* vs. *United States*, 207 U. S. 120, 52 L. Ed. 130. The late Mr. Justice Holmes in rendering the opinion of the Court stated (52 L. Ed. p. 133):

"The United States brings a writ of error under the Act of March 2, 1907 *** on the ground it must be presumed that the judgment was based upon the construction of a statute.

Petitioner does not see how this presumption can be overcome.

Therefore the Court of Appeals erred in taking jurisdiction.

CASE'S SUSTAINING PETITIONER'S CONTENTION.

The following cases decided by this Court support Petitioner's contention that the only question involved was the validity and/or constitutionality of 21 U.S.C.,

Sections 353 (b) (1),
352 (d),
331 (k).

In *United States* vs. *Nixon* (1914) 235 U.S. 231, 59 L.Ed. 207, 35 Sup. Ct. 49, it was held that the fact that the Courts omits to apply a Federal statute to an indictment which sets out facts constituting a violation of its term is as much a misconstruction of the statute as it is misinterpreting its language, and that the decision in such a case is of the very kind which the United States is entitled to have reviewed in the Supreme Court under the Criminal Appeals Act of March, 1907.

In *United States* vs. *Heinze* (1910) 218 U.S. 532, 54 L.Ed. 1139, it was held that the Act of March 2, 1907 denied to the accused neither due process of law nor equal protection of the law, and that under such Act a judgment sustaining a demurrer as to certain counts of an indictment on the ground that the facts alleged therein did not constitute a crime under the statute on which the indictment was based, was reviewable as based on a construction of that statute.

See also *United States* vs. *Heinze*, 218 U.S. 547, 54 L.Ed. 1145, holding that a judgment quashing certain counts of an indictment because not charging a crime under the statute on which the indictment was based, was a construction of that statute within the Act of March 2, 1907, and was reviewable by the Supreme Court.

See *U.S.* vs. *Carbone*, 327, U.S. 633, 90 L.Ed. 904. In this case the appellees were officers of Local 39 of International Hod Carriers, Building and Common Laborers' Union of America. They were indicted for conspiracy to violate Section 1 of Kickback Act.

Appellees moved to dismiss the indictment alleging as one

ground that it did not state an offense cognizable in law. The motion was granted.

Case was appealed, was taken direct from District Court to this Court. Judgment of lower court was affirmed.

Mr. Justice Frankfurter, Mr. Justice Burton and Chief Justice Stone dissented, and cited *United States* vs. *Swift*, 318 U.S. 442.

See also *United States* vs. *Keitel*, 211 U.S. 370, 53 L.Ed. 230.

Because of the above cases Petitioner contends that the sole question involved in the District Court's decision was the constitutionality of the aforesaid sections of the Pure Food, Drug and Cosmetic Act.

Respondent will rely upon *U.S.* vs. *Swift* & *Co.*, 318 U.S. 442, 87 L.Ed. 889, to sustain the validity of its appeal in the Court of Appeals. In that case motion to dismiss indictment charging defendants for alleged restricting channels of distribution within the Denver marketing area through which fat lambs for eastern shipment move in violation of the Sherman Act, was granted. The District Court in granting the motion to dismiss rested its decision on the construction of the Sherman Act and also on the insufficiency of the pleadings.

The Court said:

"These, we think, were rulings upon the sufficiency of the indictment as a matter of pleading, the correctness of which cannot under the statute be reviewed on direct appeal from the District Court."

Mr. Justice Rutledge took no part in the consideration of

the decision.

Mr. Justices Black, Douglas and Murphy held that:

> "The ruling of the District Court was based on a construction of the Sherman Act and that that this Court therefore has jurisdiction to review the judgment."

Mr. Justice Jackson concurring, stated:

> "I agree with the dissenting Justices that the decision of the District Court is based upon the construction of the Sherman Act."

But he actually concurred in the majority of the Justices "only because it seems to most sensible way out of our impasse in the immediate cause."

Thus we see the weakness of the contention of the Respondent. The facts in the case at bar differ from the facts in *United States* vs. *Swift*, supra, so that case is not in point.

QUESTIONS 2, 3 AND 4.

The same argument set forth under Question One applies here also, and the argument set forth there is incorporated herein by reference.

QUESTION FIVE.

Court of Appeals refused and failed to follow decision rendered by Honorable William Barker, District Judge.

Judge William Barker, Southern District of Florida, on August 1, 1952, decided the red cow case on the validity

of the sections of the Pure Food, Drug and Cosmetic Act in question and held the Durham-Humphrey Act. unconstitutional.

The facts in this case are exactly the same as the cases decided by Judge Barker. Therefore, the District Judge in this case did not err in holding the portions of the Pure Food, Drug and Cosmetics Act in question invalid and unconstitutional because of vaguness indefiniteness.

QUESTION SIX.

The argument set forth under Question Five is incorporated herein by reference.

QUESTION SEVEN.

Information failed to allege that original package contained language "Warning - May be habit forming."

21 U.S.C., Section 352 (d) under which Petitioner was indicted provides that a drug shall be deemed to be misbranded if it is for use by man and contains any quantity of named drugs which have been found to be habit-forming, unless its label bears the name, quantity, and the statement "Warning - May be habit forming."

The information in this case is silent as to

(1) Whether drug dispensed had been found to be habit forming.

(2) Whether label showed quantity or proportion of such drug, and

(3) fails to allege that the label on the prescription car-

ried a label with the words "Warning - May be habit forming."

Therefore, besides the constitutional question the information is fatally defective in this regard, and the Court of Appeals erred in reversing the District Court.

QUESTION EIGHT.

District Court order should have been affirmed. The sole basis of appeal was that Sections 353 (b) (1), 352 (d) and Section 331 (k) were unconstitutional. The lower Court disagreed. So did Judge Barker in:

U. S. vs. Kilgore, #6016-T-Criminal, Southern District of Florida, Tampa Division;

U. S. vs. Pomeroy, #6017-T-Criminal, Southern District of Florida, Tampa Division;

U. S. vs. Webb's City, Inc., #6018-T-Criminal, Southern District of Florida, Tampa Division.

These cases were decided August 1, 1952. In each of said cases the court had before it motions to dismiss similar to the motion in this case.

Counts IV through VI attempt to charge an offense under the Durham-Humphrey Act. This law was approved on October 26, 1951 and became effective "six months after the date of its enactment." (Kleinfeld & Dun Federal Food & Drug Act, 1951-1952 p. 493.

This made the said act became effective on April 26, 1952. Said Durham-Humphrey Act stated that any habit forming drug shall be dispensed only.

(1) Upon a written prescription.

(2) Oral prescription which is reduced promptly to writing and filed by the pharmacist.

(3) By refilling any such written or oral prescription, if such refill is authorized by the prescriber either in the original prescription or by oral order which is promptly reduced to writing and filed by the pharmacist.

Then the Act says:

> "The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

Each count charges a habit forming drug (21 U.S.C. 353 (b) (1) (A) was dispensed contrary to provisions of 21 U.S.C. 353 (b) (1) which is set forth above, but then each count says "which results in said drug *** being misbranded while held for sale, in violation of Title 21, U.S.C. Section 331 (k). Now 21 U.S.C. Section 331 (k) provides:

> "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, drug, device, or costmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commence and results in such article being adulterated or misbranded."

Each count charges two offenses, to-wit:

(1) Act of dispensing said drugs:

(2) Which resulted in their being misbranded.

We respectfully submit that under the facts alleged in counts IV through VI inclusive, said facts do not constitute a criminal offense adequately and definitely spelled out in the Durham-Humphrey Act is is required for criminal prosecution.

In each of the cited Tampa cases prosecution was based on violation by pharmacist of refilling a prescription merely upon a physician's prescription being on file. In each case the defendant's information was same as counts IV through VI, inclusive, and in each case the defendant filed a motion to dismiss, containing the same provisions that Petitioner's motion to dismiss contained, because each count failed to state an offense against the laws of the United States.

Honorable William J. Barker, District Judge, in granting the defendant's motion to dismiss said (August 1, 1952) in Kilgore case:

> "This case came on to be heard upon the motion to dismiss filed herein by the defendants, and the court having heard the argument of counsel, and counsel for the defendants and for the United States of America having stipulated before the court that the facts in support of the offense sought to be charged in each count consists of refilling prescriptions for certain drugs by the defendants when they was a physician's prescription on file with the defendants;
>
> "And the court being advised that refilling of such prescriptions was a practice of long standing with druggists, and that for many years the administrator of the Federal Food, Drugs and Cosmetics Act did not seek to restrict refills of prescriptions and after it sought to do so, the Congress adopted a clarifying and definite amendment, and the court being of the opinion that facts supporting the offense sought to be charged, viz. refilling prescriptions, do not constitute a criminal

offense adequately and definitely spelled out in the statute and regulations as is required for a criminal prosecution.

It is therefore ordered that the said motion is hereby granted and the information is hereby dismissed, and the defendants are hereby released from process and discharged as not guilty.

DONE AND ORDERED this 1st day of August, A. D. 1952."

The facts in each of said cases were the same in this case. Therefore the District Court did not err in granting Petitioner's motion to dismiss.

CONCLUSIONS.

Based upon the above cited statutes of Congress and the cited cases we contend that the Court of Appeals had no jurisdiction to entertain said appeal; that the Respondent's remedy was by direct appeal to this court; that the Court of Appeals in its decision has decided an important question of Federal law, which has not been, but should be, decided by this Court.

That the decision of the Court of Appeals should be reversed;

That this Court should assume jurisdiction herein and affirm or reverse the decision of the District Judge.

Respectfully submitted,

Edward S. Hemphill

George A. Pierce

Attorneys for Petitioner.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED AUG. 1, 1952, TAMPA, FLA.
EDWIN R. WILLIAMS, Clerk

UNITED STATES OF AMERICA

No. 6016-T-Criminal

v.

MB29-Page 567

WELLS B. KILGORE, an individual,
trading as Kilgore's Pharmacy,
and WELDON R. REHBURG,
an individual.

ORDER

This cause came on to be heard upon the Motion to Dismiss filed herein by the defendants, and the Court having heard the argument of counsel, and counsel for the defendants and for the United States of America having stipulated before the Court that the facts in support of the offense sought to be charged in each count consists of refilling prescriptions for certain drugs by the defendants when there was a physician's prescription on file with the defendants;

And the Court being advised that refilling of such prescriptions was a practice of long standing with druggists, and that for many years the administrator of the Federal Food, Drugs and Cosmetics Act did not seek to restrict refills

of prescriptions and after it sought to do so, the Congress adopted a clarifying and definite amendment, and the Court being of the opinion that facts supporting the offense sought to be charged, viz refilling prescriptions, do not constitute a criminal offense adequately and definitely spelled out in the statute and regulations as is required for a criminal prosecution,

It is thereupon ordered that the said motion is hereby granted and the information is hereby dismissed, and the defendants are hereby released from process and discharged as not guilty.

Done and ordered this 1st day of August A. D., 1952.

WILLIAM J. BARKER,
District Judge
Southern District of Florida

APPENDIX II

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED AUG. 1, 1952, TAMPA, FLA.
EDWIN R. WILLIAMS, Clerk

UNITED STATES OF AMERICA

No. 6017-T-Criminal

v.

MB29-Pages 567-568.

FOREST C. POMEROY, an individual, trading as Pomeroy's Drug Store.

ORDER

This cause came on to be heard upon the Motion to Dismiss filed herein by the defendants, and the Court having heard the argument of counsel, and counsel for the defendants and for the United States of America having stipulated before the Court that the facts in support of the offense sought to be charged in each count consists of refilling prescriptions for certain drugs by the defendants when there was a physician's prescription on file with the defendants;

And the Court being advised that refilling of such prescriptions was a practice of long standing with druggists, and that for many years the administrator of the Federal Food, Drugs and Cosmetics Act did not seek to restrict refills of prescriptions and after it sought to do so, the Congress adopted a clarifying and definitive amendment, and

the Court being of the opinion that facts supporting the offense sought to be charged, viz refilling prescriptions, do not constitute a criminal offense adequately and definitely spelled out in the statute and regulations as is required for a criminal prosecution,

It is thereupon ordered that the said motion is hereby granted and the information is hereby dismissed, and the defendants are hereby released from process and discharged as not guilty.

Done and ordered this 1st day of August A. D., 1952.

WILLIAM J. BARKER

District Judge

Southern District of Florida

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED, AUG. 1, 1952, TAMPA, FLA.
EDWIN R. WILLIAMS, Clerk

UNITED STATES OF AMERICA

No. 6018-T-Criminal

v.

MB29-Pages 568-569

WEBB'S CITY INCORPORATED, a corporation, and CHARLES L. FOX, an, individual,

ORDER

This cause came on to be heard upon the Motion to Dismiss filed herein by the defendants, and the Court having heard the argument of counsel, and counsel for the defendants and for the United States of America having stipulated before the Court that the facts in support of the offense sought to be charged in each count consists of refilling prescriptions for certain drugs by the defendants when there was a physician's prescription on file with the defendants;

And the Court being advised that refilling of such prescriptions was a practice of long standing with druggists, and that for many years the administrator of the Federal Food, Drugs and Cosmetics Act did not seek to restrict refills of prescriptions and after it sought to do so, the Congress adopted

a clarifying and definitive amendment, and the Court being of the opinion that facts supporting the offence sought to be charged, viz: refilling prescriptions, do not constitute a criminal offense adequately and definitely spelled out in the statute and regullations as is required for a criminal prosecution,

It is thereupon ordered that the said motion is hereby granted and the information is hereby dismissed, and the defendants are hereby released from process and discharged as not guilty.

Done and ordered this 1st day of August A. D., 1952.

WILLIAM J. BARKER

District Judge

Southern District of Florida

CERTIFICATE OF MAILING

I do certify that a copy of the above Petition for Certiorari was furnished the following:

Hon. James L. Guilmartin,
United States Attorney,
Federal Building,
Miami, Florida.

E. Coleman Madsen, Esq.,
Ass't. U. S. District Attorney,
Federal P. O. Building,
Jacksonville, Florida.

Solicitor General,
Department of Justice,
Washington, 25, D.C.

by depositing the same as addressed above in a United States Mail Box at the at the Barnett Bank Bldg., Jacksonville, Florida, first class postage prepaid on the 20th day of July A. D. '56.

George A. Pierce,
Attorney for Petitioner.

JUL 23 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 271

IN THE MATTER

OF

RUTHERFORD T. CARLISLE, an individual trading as CARLISLE DRUGS,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

APPENDIX IV AND V WHICH SHOULD BE ATTACHED TO PETITION FOR CERTIORARI HERETOFORE FILED HEREIN

EDWARD S. HEMPHILL

Florida Title Building
Jacksonville, Florida

GEORGE A. PIERCE

504 Barnett Bank Building
Jacksonville, Florida

Attorneys for Petitioners.

APPENDIX IV

JUDGMENT.

Extract from the Minutes of May 31st., 1956.
UNITED STATES OF AMERICA,

versus No. 15898.

RUTHERFORD T. CARLISLE,, an individual trading as CARLISLE DRUGS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings.

"Cameron, Circuit Judge, concurs in the result."

* * * * * * * * *

APPENDIX V

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15898

UNITED STATES OF AMERICA,

Appellant,

versus

RUTHERFORD T. CARLISLE,, an individual trading as CARLISLE DRUGS.

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(May 31, 1956.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges

HUTCHESON, Chief Judge: The appeal is taken pursuant to 18 U.S.C., 3731, from a final order dismissing Counts IV,[1] V and VI of a six count criminal information instituted under the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq.

Each of the three counts involved charges a separate violation of 21 U.S.C. 331(k). Each count charges that on different occasions the defendant caused an act to be done with respect to a drug while it was being held for sale after shipment in interstate commerce, in effect refilling a prescription without the authorization of its prescriber, as required by 21 U.S.C. Sec 353(b)(1), which resulted in the drugs being misbranded.

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1 "COUNT IV.

"The United States Attorney further charges:

"That prior to Feb. 16, 1953, a number of secobarbital sodium capsules, a drug within the meaning of 21 U.S.C. 353(b)(1)(A) as amended, were shipped in interstate commerse into the State of Florida, in a bottle labeled in part as follows:

Caution—Federal law prohibits
dispensing without prescription.

"That thereafter, on or about Feb. 16, 1953, and while a number of capsules of said drug were being held for sale after shipment in interstate commerse, as aforesaid, at Carlisle Drugs, 5012 West Beaver Street, Jacksonville, Florida, the said Rutherford T. Carlisle, an individual, at the times hereinbefore mentioned trading and doing business as Carlisle Drugs, the defendant herein, did, at Jacksonville, Florida, within the Southern District of Florida, cause a number of capsules of said drug to be dispensed in a vial to one Hosea R. Wallace, upon his request for a refill of a written prescription identified as number 8683, issued on or about Feb. 11, 1953, without obtaining authorization by the prescriber;

"That displayed upon said vial was certain labelng which consisted among other things, of the following printed and graphic matter:

"Carlisle Drugs
5012 W. Beaver St. Jacksonville, Florida
No. 8683 Dr. Grizzard
George R. Fowler
One only at bed time
2.13.53

"That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said vial being misbranded while held for sale, in violation of Title 21, U.S. Code, Sec. 331(k)."

Count V is identical with Count IV except as to the drug, the person to whom dispensed and the date of dispensing, while Count VI is identical with Count V except as to the date of dispensing.

In Count IV there is involved the drug secobarbital sodium or seconal, and in Counts V and VI the drug sodium pentobarbital. The information allages both of these drugs to be within the class of drugs described in 21 U.S.C. 353(b)(1)(A), i.e., a habit forming drug to which 21 U.S.C. 352(d) applies.

The defendant moved to dismiss the information citing thirteen grounds therefor, including alleged defects in both the information and the statute.

On August 4, 1955, the district court, denying defendant's motion as to Counts I, II, and III, granted it as to, and ordered dismissal of, Counts IV, V, and VI.

Appealing from the order of dismissal, the United States is here insisting that each of the dismissed counts states facts sufficiently charging an offense in that each count specifically and clearly charges that the act of dispensing as alleged was prohibited by 21 U.S.C., 353(b)(1),[2] and in violation of

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2 21 U.S.C. 353(b)(1)

"A drug intended for use by man which—

(A) is a habit-forming drug to which section 352(d) applies; or

* * * * *

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filled by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

21 U.S.C. 331(k),[3] for which Sec. 333,[4] 21 U.S.C. prescribes the penalty.

In support of this position, it points out that the last sentence of 21 U.S.C., 353(b)(1), recited in each of the dismissed counts, provides that the act of dispensing a drug contrary to the provisions of this paragraph "*shall be deemed to be an act which results in the drug being misbranded while held for sale*," (emphasis supplied), an act prohibited by Sec. 331(k) which prohibits "the alteration, mutilation * * * *or the doing of any other act with respect to a food, drug* * * * *while such article is held for sale* (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded." (emphasis supplied)

Appellee agrees that Counts IV, V, and VI charge the appellee with refilling a written prescription without obtaining the authorization of the prescriber, that each count charges that the barbiturate in question is a drug within the meaning of 21 U.S.C. 353(b)(1) and that each count then goes on to allege that the act of dispensing the drug was an act done by the appellee contrary to the provisions of 21 U.S.C. 353(b)(1), "which resulted in said drug in said box being misbranded while held for sale in violation of 21 U.S.C. 331(k)".

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3 21 U.S.C. 331(k)

"The following acts and the causing thereof are hereby prohibited:

* * * * *

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

4 21 U.S.C. 333. Penalties—Violation of Sec. 331.

"(a) Any person who violates any of the provisions of Sec. 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1000, or both such imprisonment and fine; * * *"

He argues that each of the counts are duplicitious in that the charge two offenses, (1) dispensing drugs without a prescription and (2) that the drug was misbranded in violation of another section.

In addition, without clearly pointing out why that would make them so, appellee insists that Section 353(b)(1) and 331(k) are unconstitutional in that they purport to affix a meaning and give a content to the word, "misbranded" quite the contrary to the meaning given it in Webster's Dictionary and the federal cases, to-wit: "to brand falsely: specifically, to brand as containers of drugs or food stuffs in contravention of statutory requirements". So insisting and citing in support *U. S. v. Cargill*, 334 U.S. 174, and *Connally v. General Construction*, 269 U.S. 385, appellee urges upon us that the sales of the barbiturates did not and could not amount to "alteration, mutilation, destruction, obliteration, or removal of the whole or any part of labelling", as defined in Sec. 331(k); that the appellant must, therefore, contend that the offense is charged in that part of the section which provides, "or the doing of any other act with respect to food, drugs, * * * which results in such article being adulterated or misbranded", and that this produces a contradiction and vagueness which deprives the defendant of due process in failing to give him notice of the offense with which he is charged.

We do not regard these positions as well taken. Giving the fullest effect possible to appellee's objections, they come at last to no more than this, that it is an unduly awkward way to go about charging an offense to have to rely upon three separate sections to make it out. While at first blush this seems to be so, upon analysis and understanding it clearly enough appears: that, as to drugs of the habit forming group, congress has prohibited the refilling of a prescription therefor without authorization of the issuing physician; and that, instead of fixing the penalty for this act by directly

setting it out in the section carrying the prohibition, it has declared the act of so refilling to be the same as misbranding and subject to the same penalty.

It did this by setting out in 353(b)(1) the only way in which drugs of the kind dealt with can be dispensed, and then in the same section going on to say that the act of dispensing such a drug, contrary to the provisions of the paragraph, shall be deemed to an act which results in the drug being misbranded. This established, by law in this section, there is required only resort to 21 U.S.C. 331(k), which denounces the offense of misbranding, and to Sec. 333, which fixes the penalty for that offense. When this resort is had, the conclusion is inescapable, we think, that the sections taken together have provided as clearly as though it had all been written out in the same section, that one dispensing drugs of the kind dealt with here, contrary to the provisions of Sec. 353(b)(1) shall be guilty of, and subject to the punishment provided by law for, an act of misbranding.[5] This necessarily results from the use in Sec. 353(b)(1) of the language, "the act shall be deemed to be an act which results in the drug being misbranded while held for sale".

In *Bowers v. United States*, 226 F(2) 424, this court dealt with a statute using substantially the same language. We there pointed out, one judge dissenting, that a statute using the words "deemed to have been marketed in excess of the quota" was intended to operate not as a presumption of fact but as a statement of a substantive rule of law, the meaning, purpose and effect of which was the same penalty should be imposed for the failure of the producer to account for the disposition of any peanuts as was provided for, and imposed upon, excess marketing. As we held there, we hold here,

5 United States v. Debrow, 346 U.S. 374; United States v. Sullivan, 332 U.S. 689; United States v. Arnold's Pharmacy, 116 Fed. Supp. 370; Jordan v. DeGeorge, 341 U.S. 223; Boyce Motor Lines v. United States, 342 U.S. 337.

that the use of the word "deemed" in the act creates an irrebutable presumption, a rule of substantive law, and that the doing of the prohibited act, dispensing the drugs contrary to the provision of Sec. 353(b)(1) and without the authorization of the prescriber, makes refilling misbranding and subjects the dispenser to the penalties provided for misbranding.

It was error to dismiss the three counts. The order is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

CAMERON, Circuit Judge: I concur in the result.

A True Copy:

Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

CERTIFICATE OF MAILING

I do certify that a copy of the above Appendix IV and V was furnished the following:

Hon. James L. Guilmartin,
United States Attorney,
Federal Building,
Miami, Florida.

E. Coleman Madsen, Esq.,
Ass't. U. S. District Attorney,
Federal P. O. Building,
Jacksonville, Florida.

Solicitor General,
Department of Justice,
Washington, 25, D.C.

by depositing the same as addressed above in a United States Mail Box at the at the Barnett Bank Bldg., Jacksonville, Florida, first class postage prepaid on the 31st day of July A. D. 1956.

George A. Pierce,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 271

IN THE MATTER OF RUTHERFORD T. CARLISLE, AN INDIVIDUAL TRADING AS CARLISLE DRUGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. V, 2-8)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1956 (Pet. App. IV, 1). A petition for rehearing was denied on June 30, 1956. The petition

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[1] Petitioner included appendices I, II and III in his original petition and continued the consecutive numbering therein. Appendices IV and V, the judgment and opinion of the Court of Appeals, were bound separately and the pagination commences with the number 1.

for a writ of certiorari was filed on July 23, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain an appeal from an order of the district court dismissing certain counts of a criminal information when it was not clear whether the order of the district court (which that court refused to clarify) was based on a construction of the statutes involved or upon the sufficiency of the pleadings.

2. Whether the dismissed counts of the information were duplicitous.

3. Whether the information was defective for failure to state that the original package contained the language, "Warning—may be habit forming," the omission of which statement constitutes misbranding under 21 U.S.C. 352(d), when petitioner was not charged with misbranding under § 352(d) but rather with refilling a prescription without authorization, another type of of misbranding under § 353(b)(1).

4. Whether the statutory definition of "misbranding" in 21 U.S.C. 353(b)(1), when construed with 21 U.S.C. 331(k), which denounces misbranding, and 21 U.S.C. 333, which fixes the penalty for that offense, is sufficiently definite for judicial enforcement.

STATUTES INVOLVED

The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the validity or construction of the statute upon which the indictment or information is founded.

* * * * *

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

The Federal Pure Food, Drug and Cosmetic Act of June 25, 1938, 52 Stat. 1040, as amended, 21 U.S.C. 301 *et seq.*, provides in pertinent part:

Section 331. *Prohibited acts.*

The following acts and the causing thereof are prohibited:

* * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for

sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

* * * * *

Section 333. *Penalties.*

(a) *Violation of Section 331.*

Any person who violates any of the provisions of section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; * * *

Section 352. *Misbranded drugs and devices.*

A drug or device shall be deemed to be misbranded—

* * * * *

(d) *Habit-forming substances.*

If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaine, barbituric acid, betaeucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Administrator, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name and quan-

tity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning—May be habit forming."

* * * * *

Section 353(b). *Prescription by physician: exemption from labeling and prescription requirements; misbranded drugs; compliance with narcotic and marihuana laws.*

(1) A drug intended for use by man which—

(A) is a habit-forming drug to which section 352(d) of this title applies;

* * * * *

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug; or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

STATEMENT

On January 6, 1954, the Government filed, in the United States District Court for the Southern District of Florida, a six-count criminal information against petitioner, charging violations of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 *et seq.* (R. 1-7).

Counts I-III of the information charged petitioner with dispensing dextro-amphetamine and thyroid tablets without a prescription.

Counts IV, V and VI charged petitioner with misbranding drugs in violation of 21 U.S.C. 331(k). Each of the last three counts charged that petitioner, on different occasions, caused a quantity of certain drugs, held for sale after shipment in interstate commerce, to be dispensed as a refill of a prescription without the authorization of the prescribing physician, which resulted in the drug's being misbranded under 21 U.S.C. 353(b)(1) (R. 4-7). The drugs involved were alleged to be within the class of drugs described in 21 U.S.C. 353(b)(1)(a), *i.e.*, "* * * a habit-forming drug to which 21 U.S.C. 352 (d) * * * applies * * *."

Petitioner moved to dismiss the information, citing thirteen grounds therefor, including alleged defects in the information and attacks on the validity of the statute (Pet. 6-7; R. 7-10). The district court granted the motion to dismiss Counts IV-VI, stating (R. 33):

> * * * Counts IV, V and VI are dismissed on authority of Judge Barker's dismissal of similar counts by orders entered August 1, 1952, in the following cases: *United States* v. *Kilgore*, 6016-T-Cr; *United States* v. *Pomeroy*, 6017-T-Cr; and *United States* v. *Webb's City Incorporated*, 6018-T-Cr * * *.

The prior orders mentioned by the district court had been entered on informations filed in 1950, before the amendment of the Food and Drug Act, effective April 26, 1952, specifically made the unauthorized refilling of a prescription for a habit-forming drug an act of

misbranding (21 U.S.C. 353(b)(1), *supra*, p. 5).[2] The charge in those cases was that the unauthorized refilling resulted in the drug's being misbranded for failure to carry the warning that it might be habit forming (in violation of 21 U.S.C. 352(d)) and failure to bear adequate directions for use (in violation of 21 U.S.C. 352(f)(1)). Since a drug dispensed on prescription was exempt from these labeling requirements (21 U.S.C. (1946 ed.) 353(b)), Judge Barker, in those cases, held in substance that, before the 1952 amendments, the refilling was also exempt. Judge Barker referred to the amendment involved in the instant case, 21 U.S.C. 353(b) as a "clarifying and definitive" amendment (Pet. App. I-III, 28-33).

On the basis of the difference between the instant case and the cases decided by Judge Barker, the government moved for a rehearing, seeking reinstatement of the dismissed counts or a clarification of the basis for dismissal (R. 34-36). The motion was denied (R. 37). The government then appealed to the Court of Appeals for the Fifth Circuit which upheld both the sufficiency of the indictment as a pleading and the constitutionality of the statute (Pet. App. V, 3-8).

ARGUMENT

1. Petitioner contends that the district court's dismissal of Counts IV to VI was predicated solely upon the unconstitutionality of the statute on which those counts were founded, with the result that the appeal

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[2] Count I of the Kilgore information is printed as an appendix to this brief. Counts II-VIII charge violations of statutory sections identical to those alleged to have been violated in Count I. The other two informations, both of which are very lengthy, are the same as the Kilgore information, except as to such matters as dates and names.

by the government lay only to this Court under 18 U.S.C. 3731 (Pet. 9-12). In view of the different situation involved in the instant case from that presented by the orders of Judge Barker to which the district court referred (see the Statement, *supra*, p. 6), and the refusal of the district court to clarify its decision, it was impossible for the government to determine the basis of the court's action. There is not a word in the district court's decision, nor was there any in Judge Barker's prior decision, as to unconstitutionality. And since the district court in this case had before it a statute which was not in effect at the time of Judge Barker's decision, on which the court purported to rely, it was impossible to tell whether the district court was construing the new statute or the sufficiency of the information. Petitioner's motion to dismiss (R. 7-9) had concentrated more on alleged insufficiency of the pleading than on the invalidity of the pertinent sections of the Food and Drug Act. Even in his petition for certiorari, petitioner argues that the information is duplicitous (Pet. 12, 13), as well as vague and indefinite (Pet. 15, 22-23), while simultaneously asserting that the only real issue in this case is one of statutory construction.[3] The government's motions for an order clarifying the basis for dismissal and for a rehearing (R. 34-36) fully apprised the district court of its error in predicating its dismissal on Judge Barker's prior decision, which antedated the amendment of the statute. The

[3] We note parenthetically that § 353(b)(1) has been incorrectly paraphrased by petitioner, undoubtedly as a result of a typographical error (Pet. 13). The petition states that the section provides that none of the drugs "can be dispensed upon written prescription." If the word "except" is inserted between the words "dispensed" and "upon," the correct meaning of the statute is conveyed.

court's refusal to grant these motions (R. 37) tended to indicate that the order would stand because of the alleged defects in the pleading. Under the circumstances, the district court's order appeared to involve a construction of the information, apart from whether it also involved a construction of the statute.[4]

If defects of criminal pleading as well as questions of statutory construction form the basis of the district court's decision, this Court cannot entertain a direct appeal. *United States* v. *Jones*, 345 U.S. 377, 378; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 203, 208; *United States* v. *Borden Co.*, 308 U.S. 188, 193. Hence, the appeal was properly taken to the court of appeals, which then had authority to pass upon the construction of the pleading and of the statute. *United States* v. *Swift & Co.*, 318 U.S. 442, 444; *United States* v. *Johnston*, 227 F. 2d 745, 749 (C.A. 3); *United States* v. *Pepper Bros.*, 142 F. 2d 340, 342 (C.A. 3).

2. Petitioner contended in the lower courts, as he does here, that the information is duplicitous (Pet. 12-13, 23-24), in that he is charged with dispensing a drug without a prescription in violation of 21 U.S.C. 353(b)(1) and with misbranding in violation of 21 U.S.C. 331(k). As pointed out by the court of appeals, this position has no merit (Pet. App. V, 7). Section 353(b)(1) defines unauthorized refilling of prescrip-

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[4] Petitioner cites *Taylor* v. *United States*, 207 U.S. 120, 126, for the proposition that there is a presumption the judgment was based on the construction of the statute (Pet. 18). This Court did not so hold. Properly punctuated, the portion of the opinion quoted by petitioner is as follows:

"The United States brings a writ of error under the Act of March 2, 1907 * * * on the ground, it must be presumed, that the judgment was based upon the construction of a statute."

The commas after "ground" and "presumed" are omitted in the petition.

tions for habit-forming drugs as misbranding.[5] Section 333 provides the penalty for misbranding. The statutes together denounce one crime, misbranding, and that was the only crime charged in the information. See *United States* v. *2600 State Drugs, Inc.*, (C.A. 7), No. 11654, decided July 11, 1956, pending on petition for certiorari, No. 309, this Term, dealing with the same issues and citing the opinion of the court of appeals in the instant case.

The reference to § 352(d) in § 353(b)(1)(A) serves merely to identify the habit-forming drugs which cannot be dispensed without a prescription. As was said in *United States* v. *Arnold's Pharmacy, Inc.*, 116 F. Supp. 310, 312 (D. N.J.):

> * * * The * * * charge in this case is the sale of a "habit-forming drug to which Section 352(d) of this Title applies," contrary to Section 353(b)(1)(A), in that it was to be dispensed only upon a written prescription of a physician, but in fact was dispensed without any such authorization; that accordingly same was a statutory "misbranding," misbrandings being a violation of the Act under Section 331(k), the penalties for such misbrandings being set forth in Section 333(a). When read with care, such statutory provisions appear neither vague nor contradictory, the allusion to Section

[5] The habit forming drugs to which § 353(b)(1) relates are defined in Section 352(d) to include barbituric acid or any chemical derivative thereof designated by the Secretary of Health, Education and Welfare, after investigation, as habit forming. The specific drugs mentioned in the information were designated as derivatives of barbituric acids. 21 C.F.R. (1949 ed.) 145.1. The regulations have the force of law. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *Archambault* v. *United States*, 224 F. 2d 925, 928 (C.A. 10).

352(d) being merely descriptive of the character of the drug, and not constituting a separate offense from that set forth above.

3. Petitioner's assertion that the court of appeals erred in failing to consider that the information did not allege that the original stamped package contained the language, "Warning—may be habit forming" (Pet. 22-23), is frivolous. Petitioner was *not* charged with misbranding by failing to label correctly under 21 U.S.C. 352(d) but rather with misbranding by refilling a prescription without authorization under 21 U.S.C. 353(b)(1). The 1952 amendment of Section 353(b) specifically prohibits the unauthorized refilling of a prescription for a habit forming drug, regardless of the validity of the original dispensing.

4. Petitioner attacks the constitutionality of § 353 (b)(1) and 331(k) because these sections purport to affix a meaning to the word "misbranded" which departs from the definition of the word in *Webster's Dictionary*, thus, he argues, rendering the statute void for vagueness and indefinite (Pet. 13-18).

As pointed out by the court of appeals in the instant case, Congress, in passing the 1952 amendment, established by law that the act of refilling a prescription without authorization of the issuing physician is misbranding (Pet. App. V, 7). This established, there is required only resort to § 331(k), which denounces the offense of misbranding, and § 333, which fixes the penalty for that offense. Congress, if it chooses, may adopt a special definition for particular words so long as the meaning of the statute is clear. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-151; *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 502. The exact

contention made by petitioner here, that in ascertaining the meaning of "misbranded" no consideration may be given to the statutory definition, was rejected by the district court in *United States* v. *Gibson*, 135 F. Supp. 807, 808 (E.D. Pa.):

> * * * The two sections [21 U.S.C. 333, 353(b)(1)] must be read together to ascertain the meaning of "misbranded" as used in the Act. It is provided that the prohibited act of dispensing such drug without prescription "shall be deemed to be an act which results in the drug being misbranded while held for sale" [§ 353(b)(1)].

Here, the particular act which Congress has prohibited is clearly and definitely set forth. The statute is therefore sufficiently definite to "give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." See *Boyce Motors Lines* v. *United States*, 342 U.S. 337, 340; *Jordan* v. *DeGeorge*, 341 U.S. 223, 231-232.[6]

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[6] In *United States* v. *Cardiff*, 344 U.S. 174, cited by petitioner (Pet. 14-15), the statute made federal factory inspection dependent upon consent of the factory operator and then made refusal to give consent a crime. What would be a valid or invalid refusal was not defined or limited. Here, the act made a crime is narrow, specific and definite.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
Warren Olney III,
Assistant Attorney General.
Beatrice Rosenberg,
Albert M. Christopher,
Attorneys.

August 1956.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

WELLS B. KILGORE, an individual, trading as Kilgore's Pharmacy, and Weldon R. Rehburg, an individual

No. 6016-T-Criminal

(21 U.S.C. 331 and 333)

COUNT 1

The United States Attorney charges:

That within the period from on or about June 23, 1950 to on or about September 30, 1950, Eli Lilly and Company shipped from Indianapolis, Indiana into the State of Florida, a bottle of Seconal Sodium capsules, a drug, which bottle was labeled, marked and branded, in part, as follows:

> CAUTION—To be dispensed only by or on the prescription of a physician.

That thereafter, on or about October 24, 1950 and while a number of capsules of said drug were being held for sale after shipment in interstate commerce, as aforesaid, at the Kilgore's Pharmacy, St. Petersburg, Florida, Wells B. Kilgore, an individual trading and doing business as Kilgore's Pharmacy, the defendant herein, did, at St. Petersburg, Florida, within the Southern District of Florida, cause a number of capsules of said drug to be repacked and dispensed to one William Stokes, in a vial labeled and marked in part "No. 41935 Dr. Wood One capsule at bedtime as needed

for sleep," without a physician's prescription therefor;

That said acts of causing the repacking and dispensing resulted in said drug in said vial being misbranded within the meaning of Title 21, United States Code, in that said drug failed to bear a label containing an accurate statement of the quantity of contents (21 U.S.C. 352(b)(2)); in that said drug was for use by man and contained seconal sodium, a chemical derivative of barbituric acid, which derivative had been by the Federal Security Administrator, after investigation, found to be and by regulation (21 CFR, 1949 Ed., 145.1) designated as habit forming, and the label of said drug in said vial failed to bear the name and quantity or proportion of such derivative and in juxtaposition therewith the statement "Warning—May be habit forming" (21 U.S.C. 352(d)); and in that the labeling of said drug failed to bear adequate directions for use (21 U.S.C. 352(f)(1));

That said acts were acts caused to be done by the said defendant while said drug was being held for sale after shipment in interstate commerce, which resulted in said drug in said vial being misbranded as aforesaid, in violation of Title 21, United Code, Section 331 (k).

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———— ——,
United States Attorney,
For the Southern District of Florida.

U. S. GOVERNMENT PRINTING OFFICE 1950